Hartaya Sdn Bhd (receiver and manager appointed) & Ors v Malayan Banking Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-21–55 OF 2009
NALLINI PATHMANATHAN JC
17 SEPTEMBER 2009

Banking — Banks and banking business — Sale and purchase agreement — Sale of non-performing loans to non-licensed institution — Whether disposal of non-performing loans by licensed institution to non-licensed institution illegal under the Banking and Financial Institutions Act 1989 — Whether Bank Negara guidelines ultra vires the BAFIA — Whether exemption order issued by Minister ultra vires — Banking and Financial Institutions Act 1989 (BAFIA) ss 49(1)(b), 49(7), 49(9)(a), 118 & 126

Civil Procedure — Injunction — Interim injunction — Interim injunction granted to restrain second and fifth defendants from disposing of plaintiffs' assets — Whether balance of convenience favoured plaintiffs

Statutory Interpretation — Construction of statutes — Purposive approach — Whether Parliament intended to accord power to Minister of Finance to exempt any person or category of persons from provisions of the Banking and Financial Institutions Act 1989 — Banking and Financial Institutions Act 1989 (BAFIA) ss 49(1)(b) & 118

On 17 January 2007, the first defendant, a licensed bank had entered into a sale and purchase agreement ('the SPA') to sell its non-performing loans and all associated loan documents to the second defendant, a non-licensed institution, subject to the approval of the Minister of Finance ('MOF'), the fourth defendant. These non-performing loans included the debts of the first plaintiff, a financially insolvent company, which the fifth defendant as the receiver and manager of the first plaintiff was appointed to manage. The plaintiffs initiated the present action against the defendants on the grounds that the SPA was null and void because it contravened the provisions of s 49(1)(b) of the Banking and Financial Institutions Act 1989 (BAFIA) ('the BAFIA') which provides that in order to dispose or transfer assets of a licensed institution, the parties must first obtain the approval of the MOF. In support of their contention the plaintiffs submitted that the first and second

A defendants had not obtained the approval of the MOF before the execution of the SPA but only subsequently. The plaintiffs therefore submitted that a binding agreement had come into effect on 17 January 2007, the performance of which was postponed until the fulfillment of the specified condition, ie the approval of the MOF and that this agreement was illegal B being forbidden by law under s 24(1)(a) of the Contracts Act 1950. Additionally the plaintiffs sought a declaration that the Bank Negara guidelines ('the BNM guidelines') dated 28 December 2006 were contrary to the provisions of the BAFIA because they allowed the sale or disposal of the banking business to non-licensed institutions when the same was expressly C precluded by s 49(1)(b) and (9)(a) of the BAFIA. As such the plaintiffs contended that the exemption and the BNM guidelines were ultra vires the BAFIA. The defendants submitted that the SPA was a conditional agreement for the sale of the non-performing loans and that it was a condition precedent to the formation for the contract or agreement that the approval of the MOF D would be procured. As such the defendants maintained that at the time of execution of the SPA, no agreement was in place as the condition precedent was not fulfilled. In conjunction with the filing of the suit, the plaintiffs had applied for and obtained an ex parte injunction to restrain the second and fifth defendants from disposing off their assets, which included a partially E completed resort hotel, nine vacant parcels of land and 22 apartment units. When the requisite 21 days had lapsed an ad interim injunction continued pending the plaintiffs' application for an interim injunction. The second and fifth defendants then applied to set aside the ex parte injunction and the ad interim injunction. The main issues in these applications were whether the F disposal of the non-performing loans, including the debts of the plaintiffs, by the first defendant, a licensed institution to the second defendant, a non-licensed institution was illegal as it was not permitted under the BAFIA and whether the BNM guidelines which were issued under s 126 of the BAFIA were ultra vires the BAFIA.

G

Held, dismissing the plaintiff's application and allowing the second and fifth defendants' application with costs:

H (1) Upon a perusal of the entirety of the SPA it appeared that the parties intended to and did enter into a conditional contract. The SPA provided for a condition precedent expressly by which it did not come into effect until the approval of the Minister had been obtained. Further s 49(1) of the BAFIA being a statutory condition precedent goes to the I formation of the agreement and not to the performance of it as contended by the plaintiffs. Therefore the first and second defendants cannot be regarded as having entered into an agreement for a sale under s 49(1)(b) of the BAFIA simply by reason of the execution of the SPA which in itself envisaged that the sale contemplated was conditional

upon the approval of the MOF. Further s 49(7) of the BAFIA allows the MOF to approve the proposed agreement with or without any modifications, variations or conditions upon receipt of the same or to refuse the application altogether. If the MOF can modify the terms of the agreement as he deems fit, it follows that the SPA dated 17 January 2007 cannot be regarded as a concluded and binding agreement. As such there appeared to be no contravention of s 49(1)(b) of the BAFIA because there was no agreement for the sale of any part of the banking business of the first defendant as of 17 January 2007 (see paras 10, 11, 12 & 14).

(2) It was evident from reading s 126 that it is a provision enabling the Minister or BNM to make regulations in respect of the conduct of the business of licensed institutions. There was nothing in s 126 that prohibited the Minister from issuing guidelines which allowed for the disposal of assets of the bank to a third party other than a licensed institution. Further, what was being disposed off in the instant case were the non-performing loans comprising the assets of the first defendant licensed institution and not its banking business per se. The collection of debts did not fall within the definition of banking business and therefore when viewed in totality the unlicensed third party was not undertaking banking business (see paras 17 & 18).

(3) In any case, the Minister had given the first and second defendants an exemption from the application of s 49(9)(a) of the BAFIA, and by reason of this the first defendant was expressly allowed to dispose off its non-performing loans to a non-licensed entity. Under s 118 of the BAFIA the Minister was empowered to exempt a person or category or class of persons from all or any part of the provisions of the BAFIA. Moreover, even if there was a conflict between ss 118 and 49(9)(a) of the BAFIA, the interpretation to be adopted should be a purposive interpretation which would promote the purpose or objective of the Act. Adopting such an approach it appeared that Parliament intended to accord power to the MOF to exempt any person or category of persons from the provisions of the BAFIA. As such the BNM guidelines, issued pursuant to s 126 of the BAFIA, and the exemption order, issued pursuant to s 118 of the BAFIA, were not ultra vires the BAFIA (see paras 22 & 24–26).

(4) The balance of convenience did not favour restraining the fifth defendant receiver and manager from realising charged assets. As the balance of convenience favoured the defendants there was no basis for the interim injunction to remain (see paras 30 & 32).

[Bahasa Malaysia summary

Pada 17 Januari 2007, defendan pertama, sebuah bank berlesen telah

menandatangani satu perjanjian jual beli ('PJB') untuk menjual pinjaman-pinjaman yang tidak beroperasi dan kesemua dokumen-dokumen pinjaman bersekutu kepada defendan kedua, sebuah institusi tidak berlesen, tertakluk kepada kebenaran Menteri Kewangan ('MK'), defendan keempat. Pinjaman-pinjaman yang tidak beroperasi ini termasuk hutang-hutang plaintif pertama, sebuah syarikat yang kewangannya tak solven, di mana defendan kelima yang merupakan penerima dan pengurus plaintif pertama dilantik untuk menguruskannya. Plaintif-plaintif memulakan tindakan ini terhadap defendan-defendan atas dasar bahawa PJB adalah batal dan tak sah kerana ia bercanggah dengan peruntukan-peruntukan s 49(1)(b) Akta Perbankan dan Institusi-Institusi Kewangan 1989 ('APIK') yang menyatakan bahawa bagi menjual atau memindahkan aset-aset institusi berlesen, pertamanya, pihak-pihak perlu mendapatkan kebenaran MK. Bagi menyokong hujahan mereka, plaintif-plaintif menghujah bahawa defendan pertama dan kedua tidak mendapatkan kebenaran MK sebelum menandatangani PJB tetapi hanya berbuat demikian selepas itu. Oleh itu plaintif-plaintif menghujah bahawa perjanjian mengikat yang berkuat kuasa pada 17 Januari 2007, pelaksanaan tersebut ditangguhkan sehingga syarat-syarat yang dinyatakan dipenuhi iaitu kebenaran MK dan bahawa perjanjian ini menyalahi undang-undang dan dilarang oleh undang-undang di bawah s 24(1)(a) Akta Kontrak 1950. Sebagai tambahan, plaintif-plaintif menuntut satu deklarasi bahawa garis panduan Bank Negara ('garis panduan BNM') bertarikh 28 Disember 2006 bercanggah dengan peruntukan-peruntukan APIK kerana mereka membenarkan jualan atau menjual perniagaan perbankan kepada institusi-institusi tidak berlesen apabila ianya secara nyata dihalang oleh s 49(1)(b) dan (9)(a) APIK. Oleh itu plaintif-plaintif menghujah bahawa pengecualian tersebut dan garis panduan BNM adalah ultra vires APIK. Defendan-defendan menghujah bahawa PJB merupakan perjanjian bersyarat untuk jualan pinjaman-pinjaman tidak beroperasi dan bahawa ia merupakan syarat sebelum pembentukan kontrak atau perjanjian bahawa kebenaran MK akan diperoleh. Oleh itu defendan-defendan mengekalkan bahawa pada masa PJB dimeterai, tidak terdapat perjanjian memandangkan syarat sebelumnya tidak dipenuhi. Sehubungan dengan pemfailan guaman, plaintif-plaintif memohon untuk dan mendapatkan injunksi ex parte untuk menghalang defendan kedua dan kelima daripada menjual aset-aset mereka, di mana termasuk hotel resort separuh siap, sembilan bidang tanah kosong dan 22 unit apartmen. Apabila 21 hari yang diperlukan berlalu maka injunksi ad interim diteruskan sementara menunggu permohonan plaintif-plaintif untuk injunksi interim. Defendan kedua dan kelima kemudiannya memohon untuk mengetepikan injunksi ex parte dan injunksi ad interim. Isu-isu utama dalam permohonan-permohonan ini ialah sama ada pelepasan pinjaman-pinjaman tidak beroperasi, termasuk hutang plaintif-plaintif, oleh defendan pertama sebagai institusi berlesen kepada defendan kedua yang merupakan institusi tidak berlesen adalah menyalahi undang-undang kerana ia tidak dibenarkan

di bawah APIK dan sama ada garis panduan BNM yang dikeluarkan di bawah s 126 APIK adalah ultra vires APIK. A

Diputuskan, menolak permohonan plaintif dan membenarkan permohonan defendan kedua dan kelima dengan kos: B

(1) Setelah meneliti keseluruhan PJB, didapati bahawa pihak-pihak bertujuan untuk memeterai dan telahpun menandatangani kontrak bersyarat. PJB memperuntukkan syarat sebelumnya secara tersurat bahawa ia tidak akan berkuat kuasa sehingga kebenaran Menteri diperoleh. Selanjutnya s 49(1) APIK adalah merupakan syarat duluan statutori yang membentuk perjanjian dan bukannya kepada perlaksanaannya sepertimana yang dihujahkan oleh plaintif-plaintif. Oleh itu, defendan pertama dan kedua tidak boleh dianggap sebagai menandatangani perjanjian untuk jualan di bawah s 49(1)(b) APIK hanya disebabkan pemeteraian PJB di mana ia membayangkan bahawa jualan tersebut adalah bersyarat dengan kebenaran MK. Selanjutnya s 49(7) APIK membenarkan MK untuk meluluskan perjanjian yang dicadangkan dengan atau tanpa sebarang ubahsuaian, ubahan atau syarat-syarat selepas penerimaan resit atau untuk mengendahkan permohonan tersebut. Sekiranya MK boleh mengubah terma-terma perjanjian sepertimana yang difikirkannya sesuai, maka PJB bertarikh 17 Januari 2007 tidak boleh dianggap sebagai perjanjian yang diputuskan dan mengikat. Oleh itu, tidak terdapat percanggahan s 49(1)(b) APIK kerana tidak terdapat perjanjian untuk jualan mana-mana perniagaan perbankan defendan pertama pada 17 Januari 2007 (lihat perenggan 10, 11, 12 & 14). C D E F

(2) Terbukti daripada bacaan s 126 bahawa ia merupakan peruntukan yang membolehkan Menteri atau BNM untuk membuat peraturan-peraturan berkenaan pengendalian perniagaan institusi-institusi berlesen. Tiada apa-apa dalam s 126 yang menghalang Menteri daripada mengeluarkan garis panduan yang membenarkan aset-aset bank dijual kepada pihak ketiga selain daripada institusi berlesen. Selanjutnya, apa yang dijual dalam kes ini ialah pinjaman-pinjaman tidak beroperasi termasuk aset-aset institusi berlesen defendan pertama dan bukannya perniagaan perbankannya per se. Pemungutan hutang-hutang tidak terangkum dalam definisi perniagaan perbankan dan oleh itu apabila dilihat secara keseluruhan, pihak ketiga yang tidak berlesen tidak menjalankan perniagaan perbankan (lihat perenggan 17 & 18). G H I

(3) Dalam mana-mana kes, Menteri telah memberikan defendan pertama dan kedua pengecualian daripada penggunaan s 49(9)(a) APIK, dan oleh sebab itu defendan pertama secara nyata dibenarkan untuk

menjual pinjaman-pinjaman tidak beroperasinya kepada entiti tidak berlesen. Di bawah s 118 APIK, Menteri diberi kuasa untuk mengecualikan individu atau sekumpulan individu daripada semua atau mana-mana bahagian peruntukan-peruntukan APIK. Lebih-lebih lagi, sekiranya terdapat konflik di antara ss 118 dan 49(9)(a) APIK, tafsiran yang digunapakai mestilah tafsiran bertujuan yang menggalakkan tujuan dan objektif Akta. Dengan menggunakan pendekatan tersebut maka Parlimen bertujuan untuk memberi kuasa kepada MK untuk mengecualikan mana-mana individu atau kategori individu daripada peruntukan-peruntukan APIK. Oleh itu garis panduan BNM, yang dikeluarkan menurut s 126 APIK, dan perintah pengecualian yang dikeluarkan menurut s 118 APIK bukanlah ultra vires APIK (lihat perenggan 22 & 24–26).

(4) Imbangan kemudahan tidak memihak kepada untuk menghalang penerima dan pengurus defendan kelima daripada merealisasikan aset-aset yang dicagarkan. Memandangkan imbangan kemudahan memihak defendan-defendan maka tiada asas untuk injuksi interim dikekalkan (lihat perenggan 30 & 32).]

Notes

For cases on banks and banking business generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1877–2022.

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3115–3187.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47, PC (refd)

Bonsel Development Pte Ltd v Tan Kong Kar & Anor [2000] 4 SLR 18, CA (distd)

Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152, CA (refd)

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)

Rock Corporation v Malayan Banking Bhd & Anor (unreported) (refd)

Smallman v Smallman [1972] Fam 25, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 (BAFIA) ss 49, 49(1), (1)(b), (1)(c), (2), (7), (9)(a), 50(1), 96, 97, 118, 118(1), 126

Companies Act 1965 s 192(2)

Contracts Act 1950 s 24(1)(a)

Interpretation Acts 1948 and 1967 s 17A

T Gunaseelan (Ahmad Amir with him) (Gunaseelan & Associates) for the plaintiffs.

S Ramesh (Adnan Sundra & Low) for the first defendant.
J Kannaperan (Anis Hashim with him) (Shearn Delamore & Co) for the second defendant.
HL Ooi (Ranjit Ooi & Robert Low) for the fifth defendant.
Jamilathul Rahimah (Bank Negara Officer).

Nallini Pathmanathan JC:

DECISION

[1] The plaintiffs in this suit initiated this action against the defendants, contending essentially that the sale of non-performing loans ('assets') by Malayan Banking Bhd, ('the first defendant') a licensed bank, to one Gale Force Sdn Bhd ('the second defendant'), a non-licensed institution vide a sale and purchase agreement dated 17 January 2007 is null and void as it contravenes the provisions of the Banking and Financial Institutions Act 1989 (BAFIA) ('the BAFIA'). Additionally the plaintiffs seek a declaration that the BNM guidelines dated 28 December 2006 are also contrary to the provisions of the BAFIA and that accordingly the Minister's exemption order is similarly null and void.

[2] In conjunction with the filing of the suit, the plaintiffs applied for and obtained an ex parte injunction dated 14 August 2009 restraining Gale Force and the receiver and manager of the first plaintiff from disposing of a partially completed 238 room resort hotel known as 'Strawberry Kijal', nine vacant parcels of land and 22 apartment units in Kemaman. After the requisite 21 days had lapsed, an ad interim injunction continues, pending the outcome of the applications set out below.

[3] Enclosures 4, 12 and 15 came before me for disposal. Enclosure 4 is the plaintiffs' application for an interim injunction, while encls 12 and 15 are applications by the second defendant and the receiver and manager, Ong Hock An ('the fifth defendant) respectively, to set aside the ex parte injunction and the ad interim injunction.

[4] The issues:

(a) the plaintiffs contend that the sale and purchase agreement dated 17 January 2007 is null and void because it contravenes s 49(1)(b) of the BAFIA. The said section provides, inter alia, as follows:

> (1) No person shall enter into an agreement or arrangement —
>
> (a) ...

A (b) for the sale, disposal, or transfer howsoever, of the whole or any part of the business of a licensed institution;

(c) ...

(d) ...

B Unless —

(A) The proposed agreement or arrangement is in writing; and

(B) All the parties thereto have first made an application in writing C to the Minister for his approval of such agreement or arrangement and have obtained the Minister's approval thereto.

(2) An application under subsection (1) shall be made by submitting D it to the Bank together with a copy of the proposed agreement or arrangement and all other information and documents as may be related directly or indirectly to the agreement or arrangement or relevant to its consideration.

E **[5]** In the instant case, the plaintiffs contend that although the sale and purchase agreement is dated 17 January 2007 the approval of the Minister of Finance ('the fourth defendant') was not obtained before the execution of the sale and purchase agreement. Such approval was obtained subsequently.

F **[6]** The second defendant and the other defendants contend in reply to this that although the sale and purchase agreement was executed on 17 January 2007 it was a conditional agreement for the sale of the non-performing loans. They maintain that it was a condition precedent to the formation of the G contract or agreement that the approval of the Minister be procured. In other words, they maintain that if the condition precedent had not been fulfilled, no agreement would come into being. As such at the time of execution of the agreement, no agreement was in place as the condition precedent was not fulfilled (see *National Land Finance Co-operative Society Ltd v Sharidal Sdn* H *Bhd* [1983] 2 MLJ 211 per Salleh Abas CJ (Malaya):

> ... It is, however a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled (see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at p 304 per Denning LJ and *Property and Bloodstock Ltd v Emerton; Bush v Property and Blood Stock Ltd* [1967] 3 All ER 321 at p 330 per Sachs LJ). I Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

[7] As applied and followed in *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152 and *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47.

[8] The plaintiffs however contend that the entire purport of the agreement is such that the condition relating to the approval of the Minister amounts to a condition precedent to the performance of the obligations under the contract. In other words, the plaintiffs maintain that a binding agreement came into being as of 17 January 2007, the performance of which was postponed until the fulfillment of the specified condition; see *Bonsel Development Pte Ltd v Tan Kong Kar & Anor* [2000] 4 SLR 18 and *Smallman v Smallman* [1972] Fam 25 where Lord Denning said on the facts of that case:

> ... in my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves it is binding on the parties. If the court does not approve it is not binding. But pending the application to the court, it remains a binding agreement which neither party can disavow ...

[9] In the instant case, the recitals, more particularly at F and G specify that the seller, ie the first defendant has conditionally, and subject to the approval of the Minister, the fourth defendant, accepted the offer made by the second defendant; and that subject to the MOF approval the seller will sell and the buyer will buy the loans together with all associated loan documents. These two recitals read in isolation appear to fall into the latter category, ie a condition precedent to the performance of obligations under the contract, rather than to the coming into being of a contract. However cl 3.1 is termed 'Condition Precedent' and provides as follows:

> The sale and purchase of the Assets shall be conditional upon the Parties obtaining MOF Approval within a period of 90 days from the date here of or such extended time as may be agreed ...

[10] Clause 3.5 of the sale and purchase agreement provides that on the non-fulfilment of the condition precedent the buyer is entitled to a return of the deposit placed with the seller and after this the agreement shall be of no further effect. Finally cl 3.6 provides that the agreement shall become unconditional and effective upon the MOF approval being given, etc. This last clause by providing for an effective date provides that the agreement does not become effective until such approval is accorded by the Minister. Therefore upon a perusal of the entirety of the agreement, it appears that the parties intended to, and did enter into a conditional contract. The agreement

provides for a condition precedent expressly, by which the agreement did not come into being or effect until the approval of the Minister had been obtained. It falls into the former category of cases, as per *National Land Finance v Sharidal*, rather than *Bonsel*'s case. Although the recitals to the agreement might well suggest that the agreement falls into the latter category, a perusal of the entirety of the agreement particularly cl 3 in its entirety shows otherwise.

[11] Secondly s 49 of the BAFIA imposes a statutory condition precedent, namely the approval of the Minister of Finance before any agreement pursuant to s 49 becomes valid. A failure to procure such approval results in the agreement being void as the object of the agreement is forbidden by law as provided in s 24(1)(a) of the Contracts Act 1950. As such, as submitted by learned counsel for the fifth defendant, compliance with s 49(1) of the BAFIA being a statutory condition precedent goes to the formation of the agreement and not to the performance of it as contended by the plaintiffs. The first and the second defendants cannot therefore be regarded as having 'entered' into an agreement for a sale under s 49(1)(b) simply by reason of the execution of the sale and purchase agreement which in itself envisages that the sale contemplated is conditional upon the approval of the Minister of Finance.

[12] Section 49(2) of the BAFIA makes reference to a 'proposed agreement' by providing that in order to dispose or transfer assets of a licensed institution, the parties must first apply to the Minister by sending a proposed agreement and the relevant information to enable the Minister to make a decision. In s 49(1)(b) the word used is 'agreement'. The respective words, 'agreement' and 'proposed agreement' are not defined. It is therefore not expressly spelt out in the BAFIA whether or not a conditional agreement such as the subject sale and purchase agreement can be entered into prior to the parties seeking the approval of the Minister. A logical conclusion would be that 'agreement' refers to a concluded contract whilst proposed agreement suggests an unconcluded contract. In attempting to determine the meaning to be attributed, a purposive approach ought to be adopted (see s 17A of the Interpretation Acts 1948 and 1967). Bearing in mind that a conditional agreement does not take effect unless the condition precedent is fulfilled such an agreement can be regarded as a 'proposed agreement' under s 49 of the BAFIA. Section 49(7) fortifies such an approach because it allows the Minister on receipt of such an application to approve the same with or without any modifications, variations or conditions or to refuse the application. If the Minister can modify the terms as he sees fit, it follows that the sale and purchase agreement dated 17 January 2007 cannot be regarded

as a concluded and binding agreement. Accordingly it cannot be said that the parties had, by executing that agreement, entered into an agreement within the meaning of s 49 of the BAFIA.

[13] For these reasons I conclude that:

(a) no binding agreement came into being on 17 January 2007 when the conditional contract was signed;

(b) the agreement only became effective upon the approval of the Minister being obtained;

(c) as such there was no contract in existence for the sale of a part of the banking business of the first defendant until the approval of the Minister was obtained; and

(d) the plaintiffs' contention that an agreement was entered into prior to the approval of the Minister being obtained is not tenable because by reason of the matters above, no agreement came into being until the consent of the Minister was obtained.

[14] As such there appears to be no contravention of s 49(1)(b) because there was no agreement for the sale of any part of the banking business of the first defendant as of 17 January 2007.

[15] As for the Bank Negara guidelines on the disposal/purchase of non-performing loans by banking institutions ('BNM guidelines') at Part 3, 3.3 which also makes reference to the need for prior approval of the Minister for the sale of a part of the banking business of a licensed institution, there does not appear to be a contravention of the same because the approval of the Minister was obtained prior to the agreement coming into force as expressly provided in cl 3.6 of the sale and purchase agreement. The contention of illegality for contravention of s 49(1)(b) therefore fails.

[16] The next issue raised is that the guidelines which were issued under s 126 of the BAFIA are ultra vires the BAFIA. Section 126 reads:

> ... The Bank or the Minister may generally in respect of this Act, or in respect of any particular provision of this Act, or generally in respect of the conduct of all or any of the licenced or scheduled businesses, issue such guidelines, circulars or notes as the Bank or the Minister may consider desirable.

[17] As such it is contended the guidelines cannot contravene the very provision in respect of which the guidelines were made. It is evident from a reading of s 126 that it is a provision enabling the Minister or the BNM to make regulations in respect of the conduct of the business of licensed

institutions. In the instant case those guidelines were used by a licensed institution, namely the first defendant to dispose of its non-performing loans to an unlicensed institution. There is nothing in s 126 that prohibits the Minister from issuing guidelines which allow for the disposal of assets of the bank to a third party other than a licensed institution.

[18] It is contended that the guidelines are not in keeping with the general tenor of the Act which envisages that no-one should carry on the business of banking, save for a licensed institution. Ultra-vires is raised in that context. One answer to this is that what is being disposed off are the non-performing loans comprising assets of the licensed institutions and not the banking business per se. These non-performing loans which are assets of the licensed institution are then realised by the purchasing third party. The collection of debts does not appear to fall within the definition of banking business. To this end, when viewed in totality the unlicensed third party is not undertaking or conducting banking business.

[19] Even if I am wrong in so concluding it is relevant that the Minister has given the first defendant and/or the second defendant an exemption pursuant to s 118(1) of the BAFIA. Section 118 provides:

> (1) The Minister may, on the recommendation of the Bank —
>
> (a) In consideration of the special circumstances relating to the constituent documents of any particular person, or any class, category or description of persons, and the nature of the business carried on by such particular person, or by such class, category or description of persons; and
>
> (b) lf he is satisfied that it would not be —
>
> (i) Prejudicial to the promotion of a sound financial structure in Malaysia; and
>
> (ii) Contrary to the public interest to do so,
>
> By order published in the Gazette exempt such particular person, or such class, category or description of persons, from all or any of the provisions of this Act.

[20] The *Gazette* notification stipulates that the Minister exempts a licensed institution from the application of s 49(9)(a) of the BAFIA in relation to the disposal of non-performing loans by a licensed institution to an institution not licensed under the Act, provided that such disposal is made in accordance with the requirements set out in the guidelines.

[21] Section 49(9)(a) provides, inter alia, that an application under sub-s (1)(b) (ie the sale or disposal of the whole or a part of the banking business) shall not be recommended by the bank and shall not be approved by the Minister where the agreement would result in the sale or disposal of the business or any part of the business to an unlicensed institution.

[22] By reason of the exemption therefore, it follows that the Minister has expressly allowed a licenced institution to dispose of its non-performing loans to a non-licensed entity. And he is empowered so to do by s 118.

[23] However the plaintiffs challenge this by stating that both the exemption and the BNM guidelines contravene, or are ultra vires the BAFIA and particularly s 49(1)(b) because the guidelines allow the sale or disposal of the banking business to non-licensed institutions, which is expressly precluded by s 49(9)(a).

[24] Dealing first with the exemption order, it was issued pursuant to s 118 of the BAFIA which allows the Minister to exempt a person or category or class of persons from all or any part of the provisions of the Act. In short the Minister is empowered to preclude the operation of the provisions of the BAFIA (save for ss 96 and 97) in respect of any person or class or category of persons. In this context the *Gazette* Notification under the Banking and Financial Institutions (Disposal of Non-Performing Loans) Exemption Order 2007 expressly allows for the disposal of NPLs to non-licensed institutions. By virtue of s 118, the Minister can validly alleviate the operation of any section of the BAFIA in relation to any person or category of persons. This would include the operation of s 49(9)(a) which relates in turn to s 49(1)(b). As the Minister enjoys this express power under s 118, it cannot be said that the exemption order is invalid or ultra vires the BAFIA as contended by the plaintiffs.

[25] This construction is further supported by s 50(1) of the BAFIA which provides that an application to court to give effect to an agreement under s 49(1)(b) or (c) of the BAFIA may be made by 'the licensed' institution or 'other person to whom the transfer is being made'. It envisages that a transfer of a part of the banking business may be made to a non-licensed institution.

[26] A similar reasoning would apply to the BNM guidelines which were issued pursuant to s 126, and when read in conjunction with the exemption order made under s 118, cannot be said to be ultra vires the BAFIA. Finally it is contended by the second defendant, and I agree with the submission of learned counsel, that even if there is a conflict between ss 118 and 49(9)(a) of the BAFIA, the interpretation to be adopted by this court should be a purposive interpretation which would promote the purpose or objective of

A the Act. Adopting such an approach it appears that Parliament intended to accord power to the Minister of Finance to exempt any person or category of persons from the provisions of the BAFIA. To interpret the section more narrowly would be to limit or restrict the powers accorded to the Minister by clear and express words in the statute.

B

[27] In summary there does not appear to this court to be a contravention of s 49(1)(b) of the BAFIA. Neither do the BNM guidelines issued pursuant to s 126 or the exemption order issued pursuant to s 118 appear to be ultra vires the BAFIA. The contention of illegality therefore fails. I am further C fortified in my conclusion by the decision of the High Court in *Rock Corporation v Malayan Banking Bhd & Anor* (unreported) where a similar challenge was mounted and dismissed. The High Court held that the non-performing loans were capable of being transferred to a non-licensed financial institution pursuant to the exemption order.

D

[28] I have attempted to consider this issue of illegality in some detail notwithstanding that this is an application for an interim injunction which normally would allow for a more cursory view as to whether or not a serious issue to be tried arises. This has been necessary because the contention of E illegality, which is essentially a question of law, has the effect of effectively determining this matter exhaustively. This is because the determination of whether or not the disposal of non-performing loans by a licensed institution to a non-licensed institution is illegal as it is not permitted under the BAFIA is the sole question in this suit. It was not possible to simply state that the F issue of illegality appears to be a serious issue and not proceed further. If I had done so, it would then leave open the possibility of illegality which could not be condoned. If indeed I had concluded that such disposal was tainted by illegality or was ultra vires the BAFIA, the result would be that all action taken thereafter would be rendered null and void and would have to cease. G This would include any action taken by the receiver and manager, the fifth defendant, as his appointment would be an issue. In those circumstances it would follow that any attempt to sell charged property by the fifth defendant would also have to be stopped. As such the other factors that would normally come into play in determining whether or not an interim injunction ought H to be granted, are of less relevance than normal on the unique approach taken in this case. It is simply a matter of whether the disposal of the non-performing loans including that relating to the plaintiffs, is null and void by reason of illegality.

I

[29] As such it was necessary to determine whether the consideration of illegality held basis or was tenable. Having considered the matter at some length, it appears to me to lack basis. The disposal of the non-performing loans, including the debt/s of the plaintiffs by the first defendant to the second defendant is legal and valid. As such there remains no basis on which the interim injunction can remain.

[30] In any event, the further factors that favour a dissolution of the interim injunction are that the balance of convenience favours the defendants. This suit was instituted long after the disposal of the plaintiffs' non-performing loan to the second defendant, some two years ago. It is only now that the receiver and manager, the fifth defendant is proceeding to effect a sale of secured property that the plaintiffs have seen fit to apply to court, and that too on an ex parte basis, to stop the sale. This does not appear to be bona fide. The balance of convenience clearly does not favour restraining the receiver and manager from realising charged assets. If the plaintiffs have a quarrel with the receiver and manager as to the manner of disposal or alleged misconduct, they are adequately protected by the provisions of s 192(2) of the Companies Act 1965.

[31] Finally the undertaking as to damages is in issue as the first plaintiff is financially insolvent, the second plaintiff has a liability in excess of RM40m and as there is no evidence of the second or third plaintiffs' ability to pay damages.

[32] I concluded that there was no tenable basis on which the interim injunction should continue and therefore dissolved the ad interim injunction. Enclosure 4 is dismissed and encls 12 and 15 are allowed. As for costs, RM12,000 is payable by the plaintiffs to the second and fifth defendants within one month of the date of this order.

Plaintiffs' application dismissed and the second and fifth defendants' application allowed with costs.

Reported by Kohila Nesan